# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 555

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ALFRED E. NORRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 3, 1930
CERTIORARI GRANTED MARCH 3, 1930

(34686)

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In United States District Court for the Eastern District of Pennsylvania

No. 2865. June term, 1928

| | |
|---|---|
| THE UNITED STATES OF AMERICA, | George W. Coles, Esq. |
| *v.* | |
| JOEL D. KERPER AND ALFRED E. NORRIS. | Ballard, Spahr, Andrews & Ingersoll, Esqs. |

*Docket entries*

Sept. 13, 1928. True bill.
" 21, " Bond of A. E. Norris in $1,500, with Hartford Accident & Indemnity Company, surety, filed.
Dec. 3, " Petition for writ of habeas corpus ad prosequendum as to Joel D. Kerper filed.
" " " Order directing warden of U. S. Penitentiary at Atlanta, Ga., to produce Joel D. Kerper in court on Dec. 18, 1928, at 10 a. m. filed—Original petition and order given to marshal for service.
" 18, " J. D. Kerper enters a plea of former jeopardy.
" " " A. E. Norris pleads—Nolo contendere.
" " " Argued sur motion in arrest of judgment as to A. E. Norris.
2 Dec. 18, 1928. J. D. Kerper changes plea to guilty.
" " " Sentence as to J. D. Kerper: Imprisonment in Federal penitentiary, Atlanta, Ga., for 1 year and 3 months from September 28, 1928, this sentence to run concurrently with that imposed on Sept. 28, 1928 (2864).
Dec. 19, 1928. Motion by A. E. Norris in arrest of judgment filed.
" " " Stipulation of facts relative to A. E. Norris filed.
" 20, " Habeas corpus ad prosequendum served December 7, 1928, see letter to district attorney filed.
" 27, " Opinion, Kirkpatrick, J., sur plea of nolo contendere filed.
" " " Motion in arrest of judgment—Motion denied in open court.
" " " Sentence: Fine $200 as to A. E. Norris.
" " " Supersedeas bond sur appeal in $400, as to A. E. Norris filed.
" " " Præcipe for transcript of record sur appeal filed.
" " " Bill of exceptions and order of court sealing same filed.
" " " Assignments of error filed.
" " " Petition for appeal and supersedeas and order of court granting prayer of petition filed.
" " " Citation allowed and issued.
" " " Copy of notice of appeal filed.
Jan. 11, 1929. Citation returned—service accepted and filed.

3 In United States District Court

[Title omitted.]

Charge: Conspiracy to commit an offense against the United States. Violation of section 37, Federal Penal Code

*Indictment*

Filed September 13, 1928

The grand inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their oaths and affirmations respectively do present:

That heretofore, to wit, on or about the 28th day of October, 1926, and continuously thereafter to the date of this indictment, in the city and county of Philadelphia, Eastern District of Pennsylvania, and within the jurisdiction of this court, one Joel D. Kerper and one Alfred E. Norris and others to the grand jury unknown, did then and there wilfully, knowingly, unlawfully, and feloniously conspire, combine, confederate, and agree together and with each other to commit a certain offense against the United States of America, to wit, to wilfully, knowingly, and unlawfully transport, and cause to be transported, on various dates and from time to time, from Philadelphia, State of Pennsylvania, to New York, State of New York, certain shipments of intoxicating liquor, a more exact statement
4 of the said dates and a more exact description of the said shipments of intoxicating liquor and the amounts thereof being to the grand jury presently unknown, containing more than one-half of one per cent of alcohol by volume, and fit for beverage purposes, in violation of Title II of the national prohibition act, approved October 28, 1919.

That according to and in pursuance and furtherance of the said wilful, unlawful, and felonious conspiracy, confederacy, combination, and agreement, and to accomplish the purpose and effect the object thereof, one of the said defendants, to wit: Joel D. Kerper, did, on or about the first day of February, 1928, ship and cause to be shipped from Philadelphia, State of Pennsylvania, to the defendant Alfred E. Norris in the city of New York, State of New York, by express, a certain package containing six unlabeled bottles of intoxicating liquor, containing more than one-half of one per cent of alcohol by volume and fit for use for beverage purposes.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT II

And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations, do further present:

That heretofore, to wit, on or about the 28th day of October, 1926, and continuously thereafter to the date of this indictment, in the city

and county of Philadelphia, Eastern District of Pennsylvania, and within the jurisdiction of this court, one Joel D. Kerper and one Alfred E. Norris and others to the grand jurors unknown, did then and there unlawfully, knowingly, wilfully, and feloniously conspire,
5 combine, confederate, and agree together and with each other, to commit a certain offense against the United States of America, to wit, to wilfully, knowingly, and unlawfully ship and cause to be shipped, on various dates and from time to time, from Philadelphia, in the State of Pennsylvania, to New York, in the State of New York, packages containing spirituous and other intoxicating liquor, a more exact statement of the said dates and a more exact description of the said packages and of the said intoxicating liquor and the quantities thereof being to the grand inquest presently unknown, without labeling such packages on the outside cover thereof so as plainly to show the nature of the contents thereof and the quantity contained therein, in violation of section 240, Federal Penal Code.

That according to and in pursuance and furtherance of the said wilful, unlawful, and felonious conspiracy, confederacy, combination, and agreement, and to accomplish the purpose and effect the object thereof, one of the said defendants, to wit, Joel D. Kerper, did, on or about the first day of February, 1928, ship and cause to be shipped from Philadelphia, State of Pennsylvania, to the defendant, Alfred E. Norris, in the city of New York, State of New York, by express, a certain package containing six unlabeled bottles of intoxicating liquor, to wit, whiskey, the said package not being labeled on the outside cover thereof so as to plainly show the nature of the contents thereof and the quantity contained therein, but being falsely labeled so as to show that it contained grenadine.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

(Sgd.) GEORGE W. COLES,
*United States Attorney.*

Philadelphia, Pa., September 11, 1928.

6 In United States District Court

*Minute entry of plea*

And now, this 18th day of December, A. D. 1928, the defendant being arraigned pleads nolo contendere in manner and form as he stands indicted, and of this, etc.

In United States District Court

*Bill of exceptions*

Filed December 27, 1928

Be it remembered that on the arraignment of Alfred E. Norris, one of the above defendants, at the December term, 1928, of the

United States District Court for the Eastern District of Pennsylvania, said defendant being arraigned pleaded "nolo contendere," and

Be it further remembered, that at said term at the United States District Court for the Eastern District of Pennsylvania, this defendant came for sentence before the Honorable William H. Kirkpatrick and thereupon there was filed in the within cause with like force and effect as if included in the indictment, a duly executed stipulation or agreement of the facts constituting the basis of the said indictment, and there was filed on behalf of the said defendant a motion in arrest of judgment and thereafter the court denied the motion in arrest of judgment and sentenced the said defendant to pay a fine of two hundred dollars, and an exception was taken to the decree of the court denying the motion in arrest of judgment and to the sentence or judgment of the court; and

The said stipulation or agreement of facts, the motion in arrest of judgment, the action of the court thereon, and the judgment of the court are as follows:

7 "STIPULATION OF FACTS RELATIVE TO DEFENDANT ALFRED E. NORRIS

"It is agreed by and between E. G. Davis, special assistant to the Attorney General, and Charles Denby, Jr., assistant United States attorney, on behalf of the United States, and Charles I. Thompson, Esq., and Frederic L. Ballard, Esq., representing defendant, Alfred E. Norris, that for all purposes in connection with the above proceedings, the following facts shall be taken to be true and of record herein with like effect as if set forth in the indictment, to wit:

"Defendant, Alfred E. Norris, resides at 55 East Seventy-second Street, New York City. His business is that of investment banker.

"Joel D. Kerper, the other defendant, for some years prior to the date of the indictment in the above case, conducted at premises known as 341 Walnut Street, Philadelphia, Pa., a business consisting in major part of the sale and transportation incidental to sale, of intoxicating liquors, in violation of the National Prohibition Act. Pursuant to said business, the said Joel D. Kerper supplied a large number of customers in Philadelphia, New York, and other places. In the course of his business conducted as aforesaid, the said Joel D. Kerper on the dates indicated, made the following shipments by prepaid express from Philadelphia to the said Alfred E. Norris, addressed to him at 55 East Seventy-second Street, New York City. These shipments were labeled as containing the merchandise indicated in each case, and purported to be sent by the shippers named:

| Date of shipment | Shipping document number | Alleged consignee | Alleged contents |
|---|---|---|---|
| [illegible] | 920-901 | J. Bowen & Co. | Syrup. |
| [illegible] | 920-902 | National Supply Co. | Olive oil. |
| 3/17/27 | 920-942 | C. Miller & Co. | Grenadine. |
| 6/14/27 | 920-926 | M. L. Brown & Co. | Olive oil. |
| 6/20/27 | 920-926 | M. L. Brown & Co. | Olive oil. |
| 7/11/27 | 920-929 | Gill & Co. | Grenadine. |
| [illegible] | 920-931 | D. P. Brown & Co. | Olive oil. |
| [illegible] | 920-917 | Penn Paint Co. | Paint. |
| [illegible] | 920-921 | Penn Paint Co. | Paint. |
| [illegible] | 920-923 | J. P. Simpson | Ink. |
| [illegible] | 920-925 | Paul J. Brown | Olive oil. |
| [illegible] | 67-901 | Penn Supply Co. | Grenadine. |

"In all of the above cases, defendant, Joel D. Kerper, was the true shipper, instead of the fictitious shipper named; and in every instance the package contained an unlawful shipment of intoxicating liquor for beverage purposes; to wit: rye whiskey. Said shipments were made by defendant, Joel D. Kerper to defendant, Alfred E. Norris, to fill orders for rye whiskey given by said Alfred E. Norris to said Joel D. Kerper over the telephone. Payment for said rye whiskey was made from time to time by Norris to Kerper, either in cash or by check. The said rye whiskey was purchased by defendant, Alfred E. Norris, for his own consumption or that of his guests; and he was in no sense a dealer of liquor.

"MOTION IN ARREST OF JUDGMENT

"Comes now the defendant, Alfred E. Norris and moves the Court in arrest of judgment for the following reasons, to wit:

"1. Upon the face of the record the defendant is not guilty of the crimes charged.

"2. The record shows that defendant merely purchased liquor and the purchase of liquor is not a crime.

"3. The record fails to show in this defendant the degree of affirmative cooperation necessary to render him liable as a conspirator to the substantive offences involved—to wit: The unlawful transportation or false labelling of interstate shipments of liquor.

9 "DECREE DENYING MOTION IN ARREST OF JUDGMENT

"Dec. 27, 1928: Motion in arrest of judgment—Motion denied.

"JUDGMENT OF THE COURT

"Dec. 27, 1928: Sentence—fine $200 as to A. E. Norris."

In United States District Court

*Order sealing bill of exceptions*

Filed December 27, 1928

And thereupon on the 27th day of December, 1928, counsel for the said defendant did except to the aforesaid decree denying the

motion in arrest of judgment and to the sentence or judgment of the court, and did then and there tender his bill of exceptions to the said decree denying the motion in arrest of judgment, and to the sentence or judgment of the court, and did request that the seal of the judge aforesaid should be put to the same according to the form of the statute in such case made and provided, and thereupon the said judge, at the request of counsel for the said defendant, did put his seal to the bill of exceptions, pursuant to the aforesaid statute in such case made and provided this 27th day of December, 1928.

(Sgd.) W. H. KIRKPATRICK, [SEAL]
*Judge.*

Approved by

(Sgd.) CHARLES DENBY, JR.,
*Asst. United States District Attorney.*
(Sgd.) CHARLES I. THOMPSON,
(Sgd.) FREDERIC L. BALLARD,
*Attorneys for Defendant,*
*Alfred E. Norris.*

10 In United States District Court

*Opinion sur plea of nolo contendere*

Filed December 27, 1928

In the indictment the defendant Norris was charged in two counts with conspiring with Kerper, the other defendant to transport liquor in violation of (a) the national prohibition act, and (b) of section 240 of the Criminal Code. Kerper pleaded guilty, and Norris, with leave of court, entered a plea of nolo contendere. After plea, evidence in the form of an agreed stipulation of facts was submitted for the information of the court in determining what sentence, if any, ought to be imposed upon the defendant Norris. This involves a consideration of whether the things which the Government agrees that the accused has done constitute the crime charged. While the plea of nolo contendere raises no issue of law or fact under the indictment, the evidence consisting of the stipulation of facts will be received and made part of the record for the limited purpose above stated.

Summarized, the stipulated facts are as follows: Norris was a banker and resided in New York, Kerper was a bootlegger and had his residence and base of operations in Philadelphia. From time to time, Norris by telephone ordered whiskey from Kerper in Philadelphia. Twelve different orders were given covering a period of over a year. Upon receiving each order Kerper sent the whiskey ordered by express from Philadelphia to Norris in New York, in packages disguised as, paint, ink, olive oil, etc. The liquor was paid for by Norris from time to time and was drunk by him and his

guests. He did not sell or intend to sell any of it, nor did he take any part in its transportation other than as above stated.

We agree that the were purchase of liquor is not an offense
11 under the national prohibition act, and that the purchaser can not be convicted of aiding and abetting the sale. Further, we will assume, without deciding, that where there is nothing in the case but a simple sale the purchaser can not be convicted of conspiring with the seller to make the sale; though it may be noted that the Supreme Court in U. S. v. Katz, 271 U. S. 354 went no farther than to say that such an indictment would be of doubtful validity.

It does not follow, however, that, where transportation is required by the agreement, there may not be an indictment of the buyer and seller for conspiracy to transport, even though what is contemplated is simply the delivery of the thing sold. Transportation of intoxicating liquor is made a distinct substantive offense by the act. It is not necessarily involved in every sale. Even if it be conceded that in order to constitute a sale of an illegal commodity, as to which the law recognizes no such thing as title, there must be more than a bare contract to transfer ownership, and that no sale, as that term is used in the act, can be effected without a change of possession (*i. e.*, actual rather than constructive delivery), still, there are many ways in which such change of possession can take place without transportation. For example, the bootlegger might, without any previous understanding or even knowledge on the part of the other party, bring the liquor to the customer's house, sell it to him and leave it there, or there might be a sale of liquor together with the premises on which it was stored, followed by the seller's moving out and the purchaser's moving in. Hence, the rule which forbids indictments for conspiracy in that class of crimes which can not be committed, except by the agreement of two parties, is not to be extended to the transportation of liquor even though it may be incident to a sale. The dictum of the Supreme Court in U. S. v. Katz supra to the effect that the embarrassment caused by that rule
12 "could be avoided only if the buyer and seller were charged with conspiring to commit a substantive offense having an ingredient in addition to the sale, not requiring the agreement of two persons for its completion," is plainly applicable to an indictment for conspiracy to transport.

The connection of the defendant Norris with the illegal transaction was decidedly more than "that degree of cooperation which would not amount to a crime" referred to by Justice Holmes in U. S. v. Holte, 236 U. S. 140. Of course, mere knowledge that a crime is about to be committed by another does not make the inactive party a conspirator, nor will awareness, coupled with acquiescence and possibly expressed approval and encouragement have that result. But in respect of the transportation, Norris did far more than know and acquiesce. He also did more than merely let Kerper know that he

was in the market for liquor. By his repeated orders of whiskey telephoned from New York to Philadelphia, he became party to an agreement which required Kerper to transport the liquor and he promised to pay him for doing it. Thus he not only solicited, but bound Kerper, by such obligation as the character of the transaction permitted, to commit the offense. As was pointed out in U. S. v. Holte supra, the word "commit" in the conspiracy statute means no more than "bring about." It is beyond all question that the purpose and intent of the agreement was to bring about the transportation of the liquor from wherever it may have been to Norris's home.

The conclusion is (1) that a conviction may be had of a buyer and seller of liquor for conspiracy to transport liquor in a case where the agreement is that the delivery of the liquor sold is to be effected by transportation from the seller to the buyer, and (2) that an
13 order by a purchaser to a bootlegger located at a distance, to deliver liquor followed by transportation, delivery and payment is sufficient evidence of such an agreement.

What has been said applies with equal if not greater force to the second count of the indictment.

It is the clear intent of Congress that the punishment for transporting liquor shall be by fine only. In this case the conspiracy element adds nothing by way of aggravation. The sentence imposed should not exceed that which would follow the conviction for transportation only.

BY THE COURT:
W. H. KIRKPATRICK, *J.*

In United States District Court

*Motion in arrest of judgment*

Filed December 19, 1928

Comes now the defendant, Alfred E. Norris, and moves the Court in arrest of judgment for the following reasons, to wit:

1. Upon the face of the record the defendant is not guilty of the crimes charged.

2. The record shows that defendant merely purchased liquor and the purchase of liquor is not a crime.

3. The record fails to show in this defendant the degree of affirmative cooperation necessary to render him liable as a conspirator to the substantive offences involved—to wit: the unlawful transportation or false labeling of interstate shipments of liquor.

CHARLES I. THOMPSON,
FREDERIC L. BALLARD,
*Attorneys for Defendant,*
*Alfred E. Norris.*

In United States District Court

*Judgment*

December 27, 1928

efore KIRKPATRICK, *J.*:

And now, to wit, this twenty-seventh day of December, A. D. 928, all and singular the premises being seen and by the Court ere fully understood, it is considered and adjudged that the de- ndant, Alfred E. Norris, pay unto the United States of America fine of $200, and stand committed until judgment is fully complied ith.

BY THE COURT:
Attest: GEORGE BRODBECK,
*Clerk.*

In United States District Court

*Assignments of error*

Filed December 27, 1928

And now, to wit, this twenty-seventh day of December, 1928, comes lfred E. Norris by his attorneys, Frederic L. Ballard and Charles I. hompson, and assigns the following errors:

1. The learned court erred in denying defendant's motion in arrest f judgment, the said motion, defendant's exception thereto, and the ction of the court thereon being as follows:

"MOTION IN ARREST OF JUDGMENT

"Comes now the defendant, Alfred E. Norris, and moves the court arrest of judgment for the following reasons, to wit:

"1. Upon the face of the record the defendant is not guilty of e crimes charged.

"2. The record shows that defendant merely purchased liquor and the purchase of liquor is not a crime.

"3. The record fails to show in this defendant the degree of affirmative co-operation necessary to render him liable as conspirator to the substantive offences involved—to wit: the un- wful transportation or false labeling of interstate shipments of quor.

"ACTION OF COURT THEREON

"December 27, 1928: Motion in arrest of judgment. Motion nied."

2. The learned court erred in holding that the facts set forth in e indictment and stipulation of facts constituted a crime under e laws of the United States.

3. The learned court erred in holding that the facts set forth in the indictment and stipulation of facts constituted an offence under section 37 of the Federal Penal Code.

4. The learned court erred in entering judgment against the defendant, said judgment being

December 27, 1928: Sentence—fine $200 as to A. E. Norris.

(Sgd.) CHARLES I. THOMPSON
and
FREDERIC L. BALLARD,
*Attorneys for Defendant,*
*Alfred E. Norris.*

16 In United States District Court

*Petition for appeal and supersedeas*

Filed December 27, 1928

*To the honorable William H. Kirkpatrick, Judge of the United States District Court:*

Alfred E. Norris, one of the above-named defendants, conceiving himself aggrieved by the judgment entered in this cause on the twenty-seventh day of December, 1928, and by the denial of the motion in arrest of judgment on said date, does hereby appeal from said judgment and said denial of the motion in arrest of judgment to the Circuit Court of Appeals for the Third Circuit, for the reasons specified in the assignments of error, which are filed herein, and he prays that his appeal be allowed and that a citation issue as provided by law, directed to the above plaintiff, and that a transcript of the record, proceedings and papers upon which said judgment and denial of motion in arrest of judgment were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit, sitting at Philadelphia, Pennsylvania.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made and that the said District Court by its proper judge may see fit to grant a supersedeas and stay of execution or of other proceedings pending such appeal.

(Sgd.) CHARLES I. THOMPSON
and
FREDERIC L. BALLARD,
*Attorneys for Defendant,*
*Alfred E. Norris.*

PHILADELPHIA, *December 27, 1928.*

17 In United States District Court

*Order allowing appeal and supersedeas*

Filed December 27, 1928

Before KIRKPATRICK, *Judge*.

And now, to wit, this twenty-seventh day of December, 1928, it is ordered that the appeal be allowed as prayed for and that security be entered by the appellant in the sum of four hundred dollars, appellant to sign his own appeal bond without surety.

And it is further ordered that the judgment appealed from be suspended pending said appeal.

By the court:

(Sgd.) W. H. KIRKPATRICK, *J*.

In United States District Court

*Præcipe for transcript of record*

Filed December 27, 1928

To the CLERK:

Certify to the Circuit Court of Appeals for the Third Circuit the following papers in the above-entitled case:

Docket entries.
Indictment.
Bill of exceptions.
Stipulations of facts.
Motion in arrest of judgment.
Order of court denying motion in arrest of judgment.
Judgment.
8 Opinion of the court.
Assignments of error.
Petition for appeal and supersedeas.
Clerk's certificate and no others.

CHARLES I. THOMPSON,
FREDERIC L. BALLARD,
*Attorneys for Defendant,*
*Alfred E. Norris.*

[Clerk's certificate to foregoing transcript omitted in printing.]

[Minute entry of argument and submission May 1, 1929, omitted in printing.]

21 In United States Circuit Court of Appeals for the Third Circuit

No. 4035. March term, 1929

ALFRED E. NORRIS, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

*Opinion*

Filed October 3, 1929

Before BUFFINGTON and WOOLLEY, *Circuit Judges*, and THOMSON, *District Judge*.

THOMSON, *District Judge*.

Any confusion or uncertainty in this case arises, not so much from difficulty in the legal question before the court, but from the manner in which the question is presented.

To make this statement clear: If a demurrer had been filed by defendant to the first count in the indictment, it must necessarily have been overruled. This, because, the charge of conspiracy between Norris and Kerper to commit an offense against the United States, namely, to unlawfully transport liquors from Philadelphia to New York, was well laid, and a demurrer thereto, which for the purposes of the motion admits the facts, must necessarily fail. The crime being legally charged, the count is good, wholly aside from the question of the evidence necessary to sustain the charge.

In the same way, the case of United States v. Holte, 236 U. S. 140, illustrates the proposition. There a woman subjected to an unlawful interstate transportation under the white slave act, was indicted for conspiracy to commit the main offense with the person causing her to be transported. The indictment so charging was demurred to and the court below sustained the demurrer. In doing so, the court, of course, assumed that the woman was not subject to indictment for the substantive offense, and that although the offense could not be committed without her, she was not a party to it but only the victim, and that therefore conspiracy to commit the offense could not lie against her. In reversing this decision, Justice Holmes said:

"We do not have to consider what would be necessary to constitute the substantive crime under the act of 1910, or what evidence would be required to convict a woman under an indictment like this; but only to decide whether it is impossible for the transported woman to be guilty of a crime in conspiring as alleged."

In another portion of the opinion he said:

"So we think that it would be going too far to say that the defendant could not be guilty in this case."

The learned justice then gives a supposititious case by way of illustration, where an immoral woman should suggest and carry out a journey with a hope of blackmailing the man and should buy the railroad tickets or pay the fare, in which case she would be within the letter of the act of 1910, and no reason would be apparent in that case why the act should not be held to apply. Justice Holmes concludes the opinion with these words:

"Therefore the decisions that it is impossible to turn the concurrence necessary to effect certain crimes such as bigamy or duelling into a conspiracy to commit them do not apply."

In other words, it is not impossible under an indictment well laid for conspiracy between the man and woman to violate the Mann Act, to assume a set of circumstances which, if established, would show a conspiracy to commit the unlawful interstate transportation.

So, in the case at bar, the indictment as drawn, legally charged the offense of conspiracy to transport between Norris and Kerper, and there would be no difficulty in conceiving a set of facts, which, if established, would sustain such an indictment, notwithstanding the conspiracy existed between the seller and the buyer.

Counsel for the Government and for the defendant recognizing this principle of pleading, agreed upon a stipulation of facts having the same force and effect as if the same were set forth in the indictment. Their clear purpose was, as frankly stated and repeated by the Government's counsel in their argument, to bring before the Court for decision the single question whether a buyer and a seller of liquors, where transportation and delivery is made in pursuance of the sale, can be together indicted for a conspiracy to transport. To limit the inquiry to this single question, Government's counsel waived the second count in the indictment, and it is therefore not before the court. In seeking to have this question decided, counsel were in a measure unfortunate in selecting this particular case. This, because, it involves not a single sale, but many sales; because the seller was engaged in the business of sale and transportation of liquors in violation of the national prohibition law; because shipments were made by him in the name of fictitious consignors and because the packages were falsely labeled as merchandise. These facts have a tendency to confuse the issue, as from them certain inferences or conclusions might be drawn, establishing, or tending to establish, an unlawful combination between the parties to transport the liquors so sold.

The learned judge conceded that the mere purchase of liquor is not an offense under the prohibition act, and that the purchaser can not be convicted of aiding and abetting the sale; and he assumed, without deciding, that where there was nothing in the case but a simple sale, the purchaser cannot be convicted of conspiracy with

the seller to make the sale. But with reference to conspiracy between buyer and seller to transport, he says:

"The connection of the defendant Norris with the illegal transaction was decidedly more than 'that degree of cooperation which would not amount to a crime' referred to by Justice Holmes in United States v. Holte. Of course, mere knowledge that a crime is about to be committed by another does not make the inactive party a conspirator, nor will awareness, coupled with acquiescence, and possibly expressed approval and encouragement, have that result. But in respect to the transportation, Norris did far more than know and acquiesce. He also did more than merely let Kerper know that he was in the market for liquor. By his repeated orders of whiskey, telephoned from New York to Philadelphia, he became a party to an agreement which required Kerper to transport the liquor and he promised to pay him for doing it. Thus he not only solicited, but bound Kerper, by such obligation as the character of the transaction permitted, to commit the offense."

23 From this he concludes "that a conviction may be had of buyer and seller of liquor for conspiracy to transport liquor in a case where the agreement is that the delivery of the liquor sold is to be effected by transportation from the seller to the buyer."

It is thus clear from this broad legal conclusion, that the court treated the stipulated facts as raising the single question whether conspiracy can be maintained between seller and buyer, where delivery of the liquor is to be effected by transportation from the seller to the buyer. This is the precise question which the parties desired should be decided by this court. In the stipulated facts, there is but one buyer and one seller. The transportation and delivery were made by the seller at his expense, the sale being initiated by the telephone order of the purchaser, and the liquors so purchased were for the consumption of the purchaser and his guests.

The second finding, which the court holds is sufficient evidence of such an agreement between seller and buyer, adds nothing to the conclusion reached in his first finding, namely, where a purchaser orders the liquors from a bootlegger located at a distance, followed by transportation, delivery, and payment. If these facts were intended by the court to support a conclusion which could not be drawn from the mere fact of purchase, followed by transportation and delivery from the seller, the purpose of the parties to obtain a decision on the real question would be frustrated.

Counsel for both parties conceded at the argument on this appeal that the learned trial judge in his opinion made a clear and precisely accurate statement of all the facts in these few words:

"Summarized, the stipulated facts are as follows: Norris was a banker and resided in New York; Kerper was a bootlegger and had his residence and base of operations in Philadelphia. From time to time, Norris by telephone ordered whiskey from Kerper in Philadelphia. Twelve different orders were given cover-

ing a period of over a year. Upon receiving each order Kerper sent the whiskey ordered by express from Philadelphia to Norris in New York, in packages disguised as paint, ink, olive oil, etc. The liquor was paid for by Norris from time to time and was drunk by him and his guests. He did not sell or intend to sell any of it, nor did he take any part in its transportation other than as above stated."

We assume, therefore, that the court did not intend in this recital of facts, to narrow the broad legal proposition which he announced in his first conclusion.

We will therefore consider and decide the interesting and very important question thus raised.

The conclusion which we have reached is based on the following considerations:

1st: It is conceded that under the eighteenth amendment, and the Volstead Act, passed to carry it into effect, the purchase of liquor is not made an offense. It follows that the purchase as such, does not subject the buyer to punishment. This is perfectly clear from the act itself. Not only did Congress carefully exclude the purchaser from the penal provisions of the act as originally passed, but has taken no step to extend its provisions to the purchaser in the ten years of legislation which have since intervened. That the intention and purpose of Congress is in harmony with the act, as drawn, is thus made perfectly manifest.

2nd: While the seller of liquor, who delivers it to the purchaser, is liable under the law both for the sale and transportation, the purchaser to whom the goods are delivered as chargeable with neither the purchase nor the transportation. It thus appears that while the legislative department of the Government has deliberately and intentionally made the purchaser of liquor guiltless of any offense under the prohibition law, the executive department of the Government seeks here, by indirection, to make of the same fact, namely, the purchase, a crime subjecting the purchaser to a maximum fine of $10,000, and imprisonment for a term of two years. Such a situation is scarcely conceivable, and yet that is the position of the Government.

3d: Concerning the crime of conspiracy, it is a well-established principle that where an offense is such that a concert of action between two persons is logically necessary to the completion of the crime, that is to say, the crime can not take place without concert, a charge of conspiracy against the two persons to commit that crime does not lie. This is the language of Judge Thompson in the case of United States v. Katz, 5 Fed. (2d) 527.

On appeal, the Supreme Court affirmed the soundness of this rule in United States v. Katz, 271 U. S. 354. Justice Stone, speaking for the court, said:

"The overt act charged in the indictment was the sale of whiskey by one defendant to another. This is an offence under the National Prohibition Act; but as the defendants in each case were only one

buyer and one seller; and as the agreement of the parties was an essential element of the sale, an indictment of the buyer and seller for conspiracy to make the sale would have been of doubtful validity. (Citing a number of cases.) This embarrassment could be avoided in an indictment for a criminal conspiracy only if the buyer and seller were charged with conspiring to commit a substantive offense having an ingredient in addition to the sale, not requiring the agreement of two persons for its completion."

See also Vannata v. U. S. 288, Fed. 424, C. C. A. Second Circuit.

In La Rosa v. U. S., 15 Fed. (2d) 479, La Rosa was indicted with Martin and Belman for conspiring to sell, barter, transport, deliver, furnish, possess, and manufacture intoxicating liquor. It appears that the only understanding La Rosa had with Martin and Belman was that he would buy certain whiskey from them and show them how to get it to his garage. The judgment of conviction for conspiracy was reversed on the appeal. Notwithstanding, there was evidence in the case from which it could be fairly said that La Rosa aided and abetted the transportation; yet, Judge Rose, speaking for the Circuit Court of Appeals, declined to consider the question of conspiracy to transport, in effect holding that it was too unsubstantial to merit serious consideration.

In Becker v. U. S., 5 Fed. (2d) 45, there was a charge of conspiracy against several defendants to commit different offenses. Liquor was found in the cellar of one of the defendants, Birnbaum, which had been delivered there, and he contended that he was merely a buyer and that there was no proof that he was a conspirator with the others. Speaking for a unanimous court, Judge Learned Hand said:

"We concede at once that merely as buyer he was not a party to the scheme in any criminal sense; that on the contrary the prosecution was bound to involve him in the plan as a whole in some other sense."

4th: In the case of seller and buyer, transportation by the seller is a mere incident in the sale, and necessary to its completion by delivery to the purchaser. It is an inherent feature, an essential element of the sale, which the seller had, on his part, to perform. The sale necessarily involves an agreement, a concert of action, between buyer and seller to effect the purchase; and it could not, with any reason be said, that a conspiracy would lie to do something which was an essential element of the sale.

Finally: Under the authorities it can not be held that the purchaser as such, is guilty of aiding and abetting either the sale or the delivery; and the degree of cooperation necessary to constitute one a conspirator, must be such as to amount to more than the mere aiding and abetting in the commission of the offence. The degree of cooperation attaching to the purchaser is fully discussed in State v. Teahan, 50 Conn. 92. That opinion concludes with these words:

"The purchaser of liquor, by his offer to buy, induces the seller of the liquor to make the sale; but he can not be said to assist him in it. The whole force, moral or physical, that went to the production of the crime as such, was the seller's."

In Lott v. United States, 205 Fed. 28, C. C. A. 9th Circuit, the court said:

"It is uniformly held that Statutes prohibiting the sale of intoxicating liquors are directed against the selling only, and that the offence is committed only by the vendor or some one who aids him in selling, and the purchaser, and those who aid him in the purchase, are not guilty of aiding or abetting in the commission of the offence."

The essential requirement of conspiracy is clearly set forth by the Circuit Court of Appeals for the Second Circuit, in the case of Lucadamo v. U. S. 280 Fed. 653.

There the court shows that knowledge, acquiescence or approval of the act, is not sufficient. To constitute a conspiracy, the evidence must show an intentional participation in the attempt to commit the offense. The lack of active cooperation between the seller and the buyer, generally speaking, is well stated in the case of State v. Teahan, 80 Conn., supra, in which the court says:

"We are satisfied that the purchaser is not an abettor of the offence within the meaning of the statute. The abetting intended by it is a positive act, in aid of the commission of the offence—a force, physical or moral, joined with that of the perpetrator in producing it . . . The abettor, within the meaning of the statute, must stand in the same relation to the crime as the criminal—approach it from the same direction, touch it at the same point. This is not the case with the purchaser of liquor. His approach to the crime is from the other side; he touches it at wholly another point. It is somewhat like the case of a man who provokes or challenges another to fight with him. If the other knocks him down, he has induced, but in no proper sense abetted, this act of violence. He has not contributed any force to its production. He touches the offence wholly on the other side. The purchaser of liquor; by his offer to buy, induces the seller of the liquor to make the sale; but he can not be said to assist him in it. The whole force, moral or physical, that went to the production of the crime as such, was the seller's."

From the foregoing considerations we are of opinion that a sale of liquor involving such transportation as is necessary to effect the delivery to the purchaser, does not subject the purchaser and seller to an indictment for conspiracy to transport. The judgment is therefore reversed.

Buffington, J., dissents.

A true copy:

Teste:

_____,

*Clerk of the United States Circuit Court of Appeals for the Third Circuit.*

26 In United States Circuit Court of Appeals for the Third Circuit

No. 4035 (list No. 66). March term, 1929

ALFRED E. NORRIS, Appellant
vs.
UNITED STATES, Appellee

*Judgment*
Oct. 3, 1929

On appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, reversed.

Philadelphia, October 3, 1929.

VICTOR B. WOOLLEY,
*Circuit Judge.*

27 [Clerk's certificate to foregoing transcript omitted in printing.]

28 Supreme Court of the United States

*Order allowing certiorari*
Filed March 3, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the cause is advanced and assigned for argument at the head of the call on Monday, April 14th, next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Indorsement on cover:) File No. 34,686. U. S. Circuit Court of Appeals, Third Circuit. Term No. 555. The United States of America, petitioner, vs. Alfred E. Norris. Petition for writ of certiorari and exhibit thereto. Filed January 3, 1930. File No. 34,6[illegible]

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